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July 31, 1989

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Trial Attorneys
Environmental Enforcement Section
P.O. 7611 Ben Franklin Station
Washington, DC 20044

RE: Lee's Land Superfund Site

Dear Walker and Anna:

In reviewing the copy of the Consent Decree which you have circulated to settling PRP's we note that you require settling Defendants to agree to reimburse the Government for past response costs in specific amounts respectively as well as for the first Five Hundred Thousand Dollars (\$500,000.00) incurred for the performance of monitoring, operation and maintenance work related to the site. We have the following questions in regard to this provision of the Consent Decree.

1) How will the first Five Hundred Thousand Dollars (\$500,000.00) be determined (i.e., actual out-of-pocket costs or will MSD's costs be treated as a charge against the \$500,000.00)?

2) For what specific activities does the Government anticipate looking to Defendants for contribution to the \$500,000.00?

3) Assuming the terms of an Administrative Order can be ironed out, will EPA's costs for oversight and checking of MSD's monitoring of the site be charged to Defendants?

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LANDS DIV.

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4) Please provide a copy of any correspondence or documents sent to any Defendant which describes the type of work for which Defendants will be liable after lodging of the Consent Decree.

In further review of the proposed Administrative Order which we discussed in the meeting in early May, 1989, we find that the AO provides no protection to MSD from liability for a share of past response costs, stipulated penalties or penalties provided under Section 122(1) of the CERCLA under certain circumstances. Our concern stems from noting that Paragraph 34 of the AO provides contribution protection only upon entering into and carrying out the terms of the AO. Paragraph 30 provides that compliance with the AO constitutes full satisfaction of EPA's claim for past response costs. Paragraphs 24 and 25 stipulate the penalties for violation of the terms of the AO and, under Paragraph 28, MSD may be held liable for costs if EPA assumes responsibilities described in the appendix to the AO. Finally, Paragraph 29 provides that EPA may seek penalties under Section 122(1) of CERCLA in lieu of seeking stipulated penalties stated in Paragraph 24.

In the event agreement can be reached on the scope of work required of MSD under the AO, it is MSD's intention to fully and completely comply with all terms of the AO. However, our concern is that nothing in the AO expressly prevents EPA from construing a failure to comply with the terms and conditions of the AO as a violation of the terms of the Administrative Order so as to constitute non-compliance with the Administrative Order. The Administrative Order now appears to entitle EPA to proceed against MSD for an apportionate share of the initial response costs, costs for activities assumed by EPA as a result of the alleged breach, as well as stipulated penalties or Section 122(1) penalties in the event of such an occurrence.

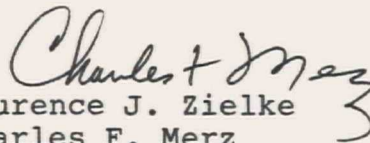
By way of a hypothetical example, assume that in 8 years EPA determines that MSD is not performing in compliance with the terms of the AO and is thereby violating the AO. Without regard to the efforts expended or costs incurred by MSD during the preceding 8 years, under the terms of the AO as it now stands, it would appear EPA has authority to assess MSD an apportionate share of the initial response costs, EPA's costs for activities undertaken by EPA as a result of MSD's alleged non-compliance and either stipulated penalties or Section 122(1) penalties. MSD's potential liability is far greater than the other PRP's under such circumstances and is disproportionate to any alleged contribution to the hazardous condition at Lee's Lane.

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This is a result which we do not believe that you intend. Accordingly, we believe that it is in interest of our respective clients that the final draft of the AO incorporate terms which will place MSD in no worst condition than other PRP's who entered into the Consent Decree and which will credit MSD with costs already expended against any liabilities.

We will be developing proposed modification to the AO for your consideration. In the meantime, we ask that you look at the proposed AO with an eye to developing you own recommended language.

Sincerely,


Laurence J. Zielke
Charles F. Merz

CFM:cb
cc: Christina Heavrin
Gordon Garner